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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

STEPHEN DOUGLAS QUILLEN, ETC.,	)	
	)	Case No. 1:04CV00139
Plaintiff,	)	
	)	**OPINION AND ORDER**
v.	)	
	)	By: James P. Jones
STERI-SYSTEMS CORP., ET AL.,	)	Chief United States District Judge
	)	
Defendants.	)	

Anthony E. Collins, Wise, Virginia, for Plaintiff; Michael C. Richards, WootenHart PLC, Roanoke, Virginia, for Defendants.

In this products liability case arising under Virginia law, the plaintiff claims that he was injured by a defective cautery pencil during surgery. The cautery pencil was allegedly manufactured and sold by the defendants. The defendants have moved to dismiss or alternately for summary judgment as to any claim of strict liability, as well as any liability arising under a theory of res ipsa loquitur.[1]

The plaintiff alleges that the defendants were negligent in the design and manufacture of the medical device. In addition, the plaintiff alleges that the defendants breached certain express and implied warranties in the sale of the device.

[1] The plaintiff has failed to file a timely response to the motions, as required by the Scheduling Order.

The plaintiff also contends that the defendants "are subject [sic] strict liability as that is known in law." (Am. Mot. J. ¶ 8.)

Finally, the plaintiff asserts that "[he] therefore invokes the doctrine of *res ipsa loquitur* and calls on the Defendants for proof as to the propriety of their conduct." (Am. Mot. J. ¶ 11.)

Recovery in product liability cases on the basis of the doctrine of strict liability is not recognized in Virginia. *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 57 n.4 (Va. 1988); *Priester v. Small*, Nos. 26541, 26520, 2003 WL 21729900, at *5 (Va. Cir. Ct. Apr. 14, 2003). Accordingly, the defendants' Motion to Dismiss will be granted on that ground.

Res ipsa loquitur is not a separate cause of action, but an evidentiary presumption in a negligence case that shifts the burden of production of evidence to the tortfeasor. *See Easterling v. Walton*, 156 S.E.2d 787, 790 (Va. 1967); *Wilshin v. City of Fredericksburg*, No. CL-91-167, 1992 WL 884516 (Va. Cir. Ct. Feb. 19, 1992). While the plaintiff here may be unable to present a case for the application of res ipsa loquitur, I cannot preclude his use of that doctrine at this point. The defendants do not request that the plaintiff's negligence claim be dismissed at this early stage of the case and it would not be appropriate to make rulings now as to the proper burden of production of evidence.

Accordingly, the defendants' motion to dismiss or for summary judgment as to res ipsa loquitur will be denied.[2]

For the foregoing reasons, it is **ORDERED** as follows:

1. The Motion to Dismiss Plaintiff's Claims of Strict Liability and *Res Ipsa Loquitur* or for Partial Summary Judgment is granted in part and denied in part;

2. Any claims based on strict liability are dismissed; and

3. The motion is otherwise denied.

ENTER: February 17, 2005

/s/ JAMES P. JONES
Chief United States District Judge

[2] The defendants filed an earlier Motion to Dismiss or for Summary Judgment. In response, the plaintiff conceded that he had failed to state a claim and obtained leave to file an amended complaint. Thereafter the defendants filed the present motion. I will deny the earlier motion as moot.